

Report of the EFC/ERA Seminar 2006

**Towards a European Framework for Foundations in
Europe**

Held on September 14th 2006

*at
the Bavarian Representation in Brussels*

Organised by the Academy of European Law (ERA) and the European Foundation Centre (EFC), and in cooperation with the Bavarian Representation to the European Union

Chairs:

Denis Edwards, Barrister at Hardwicke Building in London

Ludwig Forrest, Project Manager at the King Baudouin Foundation, member of the EFC Legal and Tax Task Forces

Executive Summary

At a seminar organised by the European Foundation Centre (EFC) and the Academy of European Law (ERA) on September 14th 2006 in Brussels, it was announced that European Commissioner McCreevy will decide on the launch of a feasibility study on a European Foundation Statute this autumn.

Some 40 participants from across Europe discussed with representatives from the European Commission the benefits of such a statute, and what form it should take. The Commission completed a public consultation during the first half of 2006 on the future priorities concerning modernisation of company law and enhancing corporate governance in the EU. Nathalie Berger of European Commission Directorate General Internal Market & Services pointed out that, through the consultation, the European Commission had learned just how strong the support of the sector is for the development of a European Foundation Statute. The Commission received 266 contributions to the public consultation, a third of which came from foundations. Participating foundations supported the launch of a feasibility study on a European Foundation Statute. Ms Berger informed participants that the European Commission is to issue a statement to the European Parliament on the matter in due course.

Participants in the seminar were informed about an important European Court of Justice (ECJ) ruling of the same day in the so-called “Stauffer” case by Francis Houben of Legal & Tax Management SPRL. Sections of German tax law were seen by the ECJ to be in conflict with the EC Treaty. According to current German tax law, tax exemption granted to public benefit organisations does not apply to public benefit organisations that have their registered office and/or governance structure outside Germany¹. Mr Houben also outlined current infringement procedures launched by the European Commission in the field, one against Belgium and the second, more recent one against the UK. The Commission is of the opinion that the Walloon inheritance and gift tax and the UK tax scheme discriminate against foreign public benefit organisations². Currently quite a number of national tax laws are under scrutiny by the European Commission and the ECJ, a process that will, it is hoped, encourage Member States to introduce a cross-border-friendly environment for foundations and their donors. It was recalled that a European Foundation Statute would need to be embedded into tax changes at the national level if it is to achieve the aim of facilitating foundations’ cross-border work and cross-border giving.

The barriers resulting from the current legal and tax regimes to the international work of foundations and their donors was highlighted by Nilda Bullain of the European Center for Not-for-Profit Law (ECNL). Administrative burdens encountered in the procedure for setting up a branch in another country, problems with the recognition of legal personality, and difficulties with running operations abroad are operational barriers to foundations’ transnational work. Often foundations have to set up local organisations in different countries to operate efficiently and this of course is costly and time-consuming.

The foundation sector is of the opinion that a European Foundation Statute would help to overcome some of the barriers mentioned above and would improve the climate overall for foundations and funders that work across borders. Jan Scherphuis of Oranje Fonds outlined how a European Foundation Statute could contribute to European objectives and policies in various areas and could strengthen European citizenship and the advancement of the European public good. The European Foundation Statute would be the appropriate tool to

¹ The ECJ decision on case C-386/04 as well as the opinion of the Advocate General can be downloaded at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-386%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

² See press release IP/06/964 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/964&format=HTML&aged=0&language=EN&guiLanguage=en>

actively build and support private investment for the European public good. Mr Scherphuis also stated that there is no good reason why foundations, as one of the oldest existing legal structures, should not benefit from the ongoing process of the development of a truly European Company law, and he referred to the European Company Statute and the European Co-operative Statute.

Are public benefit foundations covered by the EC Treaty? What could be the legal basis for a European Foundation Statute? Thomas von Hippel of the Max Planck Institute for International Private Law in Hamburg shared his opinion that public benefit foundations would be covered by the freedom of establishment (when offering goods and services) or the free movement of capital (when only grantgiving).

What would such a European Foundation Statute look like? For many years the Statute has been discussed by representatives both from within and outside the foundation community, including foundation practitioners, legal and tax experts and researchers. Henrique Antunes, representing the Portuguese Luso-American Foundation, presented the EFC's recommendations for such a Statute, which were finalised in 2005. The Bertelsmann Foundation brought together an international group of legal academic researchers who published their research findings about a European Foundation Statute this year. The findings were highlighted by Thomas von Hippel. Both recommendations opt for an additional and optional European legal tool, which would be governed by a EU Regulation.

In the absence of a European legal tool for foundations, the sector has had to develop innovative structures to create international networks and funds. Wolf Schmidt, Member of the Executive Board of the German Körber Foundation, presented a case study of EUSTORY, the History Network for Young Europeans. EUSTORY could present a model for a virtual European Foundation, which connects civil society and the private sector in a framework of cooperation between a foundation and a bank. Ludwig Forrest of the King Baudouin Foundation outlined the Transnational Giving Europe Agreement, which enables donors to identify qualifying partners in participating countries to facilitate cross-border giving. The foundation has also launched a cross-border giving database, which collects information about the national legal and fiscal treatment of cross-border gifts, donations and legacies and serves as an information tool for donors, intermediaries and beneficiaries about the best options and solutions for cross-border giving.

NOTE

An event organised by the Academy of European Law (ERA) and the European Foundation Centre (EFC) in cooperation with the Bavarian Representation to the European Union

Context

Foundations' work and donors' concerns have grown international, but the legal environment for cross-border giving and cross-border activities of foundations lags behind. Foundations often have to set up foundations in several countries if they want to be active at an international level, and cross-border giving is hampered by national tax laws. There are two new developments, which now create a momentum for the European foundation sector: First, the development of a European legal form is high on the political agenda of the European Commission, which consulted stakeholders in the first half of 2006. European Commissioner McCreevy will decide this autumn on the launch of a feasibility study on a European Foundation Statute. Secondly, the European Commission as well as the European Court of Justice has over the last few years questioned the compatibility of a series of national tax laws for public benefit organisations with the EC Treaty. Some 40 participants from across Europe discussed with representatives from the European Commission and foundation law experts the benefits of such a statute, and what form it should take.

Denis Edwards, Barrister at Hardwicke Building in London and Ludwig Forrest, Project Manager at the King Baudouin Foundation, member of the EFC Legal and Tax Task Forces chaired the event.

1. Welcome and introduction

María Pilar Núñez Ruiz, Course Director, European Business Law at ERA welcomed participants on behalf of ERA and stressed the fruitful cooperation of ERA with the EFC in organising the event on European foundation law. She thanked the Bavarian Representation for kindly hosting this important legal seminar. ERA, which was set up in 1992 as the result of an initiative of the European Parliament to raise awareness of European law among legal practitioners throughout the European Union (EU) and to open a forum for a European legal debate, has been following European Company law developments as part of its overall mission. Being itself organised in the legal form of a foundation with its seat in Trier, Germany, ERA has also become familiar with the particular problems and challenges of foundations with cross-border activities in the internal market from a practical point of view. An important question seems to be emerging in the field of European Company law after 30 years of deadlock: "Do we need a European foundation statute or special EU coordination on foundations?" This question leads to other more important questions such as: is Europe aware of the challenges and problems facing foundations? Is their voice heard in the European context? Have foundations succeeded in bringing to the attention of the European institutions their particularities and their problems in the internal market? Mrs Núñez Ruiz recalled that in December 2005 the European Commission launched a public consultation on the future priorities concerning modernisation of company law and enhancing corporate governance in the EU. Stakeholders were asked to submit their contributions by the end of March 2006. The consultation addresses pending proposals set out in the Commission's 2003 Action Plan³ in the field, including the development of a European legal form for foundations. Back in 2001, the European

³ Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward" COM (2003) 284 final

Commission set up a High Level Group of Company Law Experts to review current trends in the field of European company law. Based on the group's 2002 recommendations, the European Commission presented its Action Plan on modernising company law and enhancing corporate governance in the EU in May 2003. The 2003 Plan announced the launch of a study aimed at assessing in depth the feasibility of a European foundation statute by no later than 2006. Following the EU enlargement, the Commission decided in 2005 to open a new public consultation on the matter with a view to reviewing some of the 2003 Action Plan priorities and actions.

Emmanuelle Faure, Director European Affairs of the EFC, welcomed participants on behalf of the EFC and thanked the ERA for the good cooperation in organising the event and the Bavarian Representation for hosting it. She stressed that the EFC aims to promote the role of foundations and their visibility in Europe, at both EU and national levels. A priority area in the work of the EFC is to help develop and maintain a favourable operating environment for foundations and private funders in the European Union. The EFC has developed some key materials during the past five years to help rethink and advance foundations' legal and fiscal operating frameworks, and private giving in the EU. Besides maintaining an updated comparative information database about the legal and fiscal environment of foundations, the EFC wishes to monitor legal-fiscal developments at national and EU levels and to provide a platform for exchange and debate. The EFC therefore decided to organise seminars on a regular basis for a broader public on current legal and fiscal topics where practitioners and researchers can debate. The issue of existing barriers to cross-border giving was addressed by a seminar in spring 2004 in cooperation with EFC members the King Baudouin Foundation and the Charities Aid Foundation, and the European Association for Planned Giving. The question of whether or not public benefit foundations should be allowed to have direct and indirect economic activity through ownership or major shareholding in another legal entity was the focus of an EFC seminar held in Turin on December 2nd 2005.

The development of a European Statute for Foundations lies at the core work of the EFC. The EFC is convinced that such a statute would improve the legal operating environment for the increasing number of foundations that want to develop transnational cooperation, as well as individuals and other private funders with activities and assets in various EU Member States. The EFC published recommendations on such a statute in 2005 and has presented them at a series of national and international conferences. When ERA stated an interest in organising a seminar on this important topic, the EFC was more than pleased to cooperate with ERA in this regard.

The EFC and its members participated actively in the consultation on European Company Law and called upon the Commission to carry out the feasibility study on a European Foundation Statute in due course as a first step towards the review and adoption of a proposal by EU institutions in due course. At the same time, foundations are eager to hear from the Commission about its future plans in this area.

2. How does a European Legal Form for Foundations fit into Future Priorities of the European Commission on Company Law?

Nathalie Berger of DG Internal Market & Services reported on the results of the Commission public consultation during the first half of 2006 on the future priorities concerning modernisation of company law and enhancing corporate governance in the EU. She pointed out that, through the consultation, the European Commission had learned just how strong the support of the sector is for the development of a European Foundation Statute. Ms Berger informed participants that the European Commissioner McCreevy is to issue a statement to the European Parliament this autumn on the launch of a feasibility study on a European Foundation Statute.

The European Commission completed the public consultation during the first half of 2006, which in its question 13 addressed the potential launch of a feasibility study for a European legal form for foundations. On July 7th the European Commission published a report on the public consultation and on the associated public hearing held on May 3rd 2006, which show a clear support for the European Foundation Statute by the foundation sector. The Commission received 266 contributions to the public consultation, one-third of which were from foundations. 55 percent of the 266 respondents to the consultation addressed question No. 13 on the European Foundation Statute. A high number of foundations from a wide range of sectors (science, research, education, culture, health, social welfare, finance, etc.) addressed this issue exclusively. The foundation sector unanimously urged the Commission to carry out a feasibility study on a European Foundation Statute. The full report is available at: http://ec.europa.eu/internal_market/company/news/index_en.htm. Mrs Berger stated that a relatively low number of respondents to the consultation from outside the foundation sector expressed views on this issue. Some of these respondents questioned whether there is a real demand for such a Statute. Some argued that the main difficulties foundations are currently facing could be resolved by ensuring mutual recognition and facilitating cross-border fundraising. Foundations and EFC members have been very actively involved in the consultation process. Mrs Berger stated that the mobilization of the foundation sector on this topic has caught the attention of the Commission.

3. Barriers to Cross-Border Activities of Foundations

The barriers resulting from the current legal and tax regimes to the international work of foundations and their donors were highlighted by **Nilda Bullain** of the European Center for Non-for profit Law (ECNL) in Budapest.

The main barriers that Ms Bullain focused on were as follows:

- A foundation's legal personality status is normally accepted in a foreign country. However, legal recognition in a foreign country has in the past caused problems for some foundations. Usually a domestic registration is required, some countries even require a special recognition, which is the case in Estonia and Italy. In some countries such as Hungary, branches of foreign foundations may not be set up. Often foundations have to set up local organisations in different countries to operate efficiently, which is of course costly and time-consuming. This is what happened to the Carpathian Foundation, which had to set up local organisations. This increases the costs for administration and hinders legal continuity.
- Most EU countries refuse tax deductibility for donations (by individual or corporate taxpayers) made to foreign public benefit organisations. Resident NGOs could in these cases serve as intermediaries if they have branches or programmes in other countries. This however is costly and involves higher bureaucracy to meet accountability requirements.
- National gift and inheritance tax laws sometimes only provide for an exemption for donations that go to domestic public benefit foundations and not to foreign-based public benefit organisations.
- Foundations are often subject to withholding taxes on their foreign investments, which are not refundable. This hampers efficient asset allocation. Mrs Bullain mentioned that the European Pension Funds eliminated the distinction between local and foreign pension funds (via the OECD Model Treaty) and this could also serve as a benchmark for the foundation sector.

Ms Bullain also highlighted some of the rationales for not applying tax benefits on foreign gifts. In some countries (Germany, Hungary and Poland), the entitlement for tax exemption includes a territorial principle. However, exemptions are often made for foreign aid, development assistance, humanitarian work etc. Another argument often used by national governments is that the donor's state does not benefit when allowing the tax deductibility for a donation that goes abroad. But one could consider that the benefit could also improve the country's image. A

third argument is the different concepts and definitions of the public benefit status. Ms Bullain indicated that a solution for this problem could be found through bilateral treaties. The fourth argument is that “the state cannot ensure proper use of the gift”. However, similar supervision problems also exist in other exemption cases, for example regarding business activities. She briefly mentioned possible solutions to these barriers, which can be found at the national level through the extension of tax benefits to cross-border philanthropy as well; at the bilateral level through bilateral treaties or at European level.

4. Added Value of a European Legal Form for Foundations

The foundation sector is of the opinion that a European Foundation Statute would help to overcome some of the barriers described above and would improve the climate overall for foundations and funders that work across borders. **Jan Scherphuis** of Oranje Fonds highlighted how a European Foundation Statute could help advance the European public good. It could address European citizens’ needs and contribute to EU objectives. Citizen concerns do not stop at borders, nor should foundations work. Foundations contribute to the development of a series of policy areas, which are of cross-border relevance. Mr Scherphuis outlined a few examples, ranging from supporting citizen participation to contributing to the overall Lisbon Strategy of the EU. The European Foundation Statute could give citizens a tool to be more actively engaged in their various fields of interest, including public health and consumers’ rights, rule of law, cultural and other fundamental rights.

Foundations and their funders are increasingly affected by the globalisation of the economy, both in terms of their action and their income, in particular those foundations and funders that have operations and assets in different countries. Increasingly, foundations integrate a global dimension into their work to meet citizens’ concerns, not to mention those foundations that are set up to address exclusively European and international issues and concerns. They do require a new legal instrument enabling them to operate and work in an effective way at a cross-border and at a European level.

The EFC believes that an optional European legal tool for foundations would also advance cross-border cooperation in areas where the pooling of expertise and resources is badly needed for example in cooperation and investment in research, education and training, the management of the natural resources, cultural cooperation, regional co-operation for socio-economic development, in particular for those foundations which work in border areas. Foundations and funders are willing to create synergies by collaborative efforts, but they lack the appropriate tool to do so. A European statute could provide the environment to further engage in joint initiatives. In fact, in practice the case for a European statute is growing: the EFC is itself eloquent evidence of the coming together of foundations at the European level, and the well-established practice of co-funding and engaging in joint activities and projects is beginning to translate into increased trans-national collaborative projects not only within the EU but also in third countries. Mr Scherphuis also stated that there is no good reason why foundations, as one of the oldest existing legal structures, should not benefit from the ongoing process of the development of a truly European Company law, and he referred to the European Company Statute and the European Co-operative Statute. There must be equal rights for all activities, which contribute to the objectives of the European Union, irrespective of the legal form taken by the body that carries them out.

The European Foundation Statute could also be seen as a benchmark and quality brand in terms of governance, transparency and accountability in cross-border work and financing, at a time when the prevention of terrorism financing is of key concern to national governments, European and multilateral institutions. It would provide a sort of quality brand and guarantee for donors and third parties, including beneficiaries and public authorities at the regional, national, European and international levels.

Mr Scherphuis pointed out that a European Foundation Statute would have to contain, or set in motion at the national level, tax changes if it is to achieve the aim of facilitating the cross-border giving and receiving of gifts to and from foundations in different Member States. In the field of direct taxation, the legislative competence lies with the Member States. However, they must ensure that these national laws do not discriminate against individuals or legal entities on grounds of their nationality.

5. The Feasibility of a European Legal Form for Foundations

Thomas von Hippel of the Max Planck Institute for International Private Law in Hamburg stated that a Statute or Regulation for a European foundation needs a legal basis within the EC Treaty. Such a European Regulation would be based on Articles 95 (requires co-decision of the Council and the European Parliament) and 308 (requires unanimous decision of the Council) of the EC Treaty. He stated that only one of the two articles would be applicable and it is controversial, which of the two articles is the correct legal basis for the introduction of European legal forms. While other European statutes were based on the “catch-all” rule of Article 308 of the EC Treaty, the European Parliament has argued that Article 95 must be applied. Mr von Hippel stressed that the differences between Article 95 and Article 308 were just procedural (regarding the question of what procedure is needed in order to adopt a legal instrument). Both articles require that a European legal instrument is necessary in order to further the realisation of the freedoms of the EC Treaty. Thus the critical point – as regards the legal basis of a European Foundation – is, whether a European foundation is necessary in order to further the realisation of the freedoms of the EC Treaty. Mr von Hippel analysed which of the freedoms of the Treaty are applicable to the establishment of a European foundation. One could argue that the Freedom of Establishment in Article 48 of the Treaty would be relevant. However, it could be argued that other European legal forms are “economic” European legal forms which can lay claim to the freedom of establishment (Article 48), whereas a foundation is typically a public benefit entity. The wording of Article 48, paragraph 2, of the EC Treaty explicitly excludes “non-profit-making” organisations. It is not clear how this exclusion is to be understood. Mr von Hippel reported that the prevailing view favours testing the activities of the organisation. An organisation undertaking economic activities is protected by the freedom of establishment, regardless of the question of whether this organisation has a non-distribution constraint or is tax-exempted⁴. As a consequence of this test, all foundations undertaking economic activities would be covered by the freedom of establishment.

However, even if the freedom of establishment only protects foundations with economic activities, Mr von Hippel reported that purely grant-making foundations would fall under the freedom of capital movement (Art. 56, EC Treaty). All EU directives on capital movement, starting with the first one from 1960, contain an annex with descriptive examples of transactions regarded as capital movements. One category is “capital movement of a personal character”, which explicitly names “gifts” and “legacies”⁵. Although the annex contains no binding definition of capital movements, all legal scholars agree that the categories in the annex can be used to help determine which transactions fall within the freedom of capital movement. So did the European Court of Justice in its recent decision on the “Heirs of Barbier” case (C-364/01), where the Court ruled that the inheritance of immovable property falls within the freedom of capital movement. Thus, a European Foundation with economic activities could be based on the freedom of establishment, while a European Foundation with grant-making activities on the freedom of capital movement.

6. What Type of European Foundation Statute?

What would such a European Foundation Statute look like? For many years the Statute has been discussed by representatives from both within and outside the foundation community, including foundation practitioners, legal and tax experts and researchers. **Henrique Antunes**, representing the Portuguese Luso-American Foundation, presented the EFC’s

⁴ *Troberg/Tiedje*, in: von der Groeben/Schwarze, Art. 43 EG, Rn. 55; see also *Sørensen/Nielsen*, p. 513.

⁵ See First Directive to Art. 67 EC Treaty, Annex I, List A, Official Journal, 921/60, 924/60.

recommendations for such a Statute, which were finalised in 2005. The Bertelsmann Foundation brought together an international group of legal academic researchers who published their research findings this year. These findings were highlighted by **Thomas von Hippel**. Both recommendations opt for an additional and optional European legal tool, which would be governed by a EU Regulation.

The EFC recommendations on a European Statute for Foundations, which are based on a comparative analysis of EU foundation laws, are available online at:

http://www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf

Mr Antunes outlined that the EFC recommendations set out basic elements of a potential new complementary legal form of a European foundation. This European foundation would be an optional and additional instrument that funders and foundations active in more than one EU Member State may want to use instead of setting up several foundations according to national law in different EU countries. According to the EFC recommendations, the European Foundation (EF) is an independently constituted and managed body, having at its disposal irrevocably dedicated assets to pursue its public benefit purposes. An EF would need to have activities in at least two Member States and a minimum capital of 50,000 euros. It could be set up in perpetuity or for a specified period of time. Legal personality would be reached upon registration with the competent authority, which would also exercise supervision of the later operation of the foundation. All income must be used for the pursuit of its public benefit purpose. The assets of an EF may not revert to private ownership. The EF would have to serve the public interest at large at the European and international levels. Its purposes would include one or more of an open list of purposes, which is included in the EFC draft. According to the EFC definition, the European legal instrument would pursue public benefit purposes only. Legal capacity is defined as widely and completely as possible. An EF shall in particular be allowed to engage in trading or other economic activities provided that the income is used for the pursuance of its public benefit purpose. The economic activity can either be performed directly by the foundation or indirectly through another legal entity.

An EF may be established in different ways. For reasons of legal security, a simple written declaration will not suffice. The notarial deed or will must include an expression of the founder's (founders') wish to set up an EF and mention which assets the founder(s) will donate. In addition, the deed or testament needs to define the public benefit purpose(s) which the EF shall pursue. Any individual(s) and/or legal person(s) resident in one or more Member States has (have) the right to set up an EF as long as the legal requirements set out in this law are met. Legal personality should be reached upon registration by a European Registration Authority. Where the establishment of a European Registration Authority would not be seen as feasible, the registration and establishment of an EF could also be exercised at the national level. One has to bear in mind, however, that this would lead to 25 different ways of setting up EFs and also 25 different supervisory systems.

The research undertaken by the Bertelsmann Foundation expert group proposes that any national foundation which pursues only local activities could be set up as a European foundation, whereas the EFC draft requires a European dimension. Another difference with regard to the EFC recommendations is the fact that European foundations should not be allowed to engage directly in economic activities. Mr von Hippel stressed that this was considered necessary in order to protect creditors of the European foundation, whereas the EFC draft has introduced a minimum capital, which would also guarantee some sort of creditor protection.

7. National Tax Law Under Review by European Institutions

Participants in the September 14th seminar were informed by **Francis Houben** of Legal & Tax Management SPRL about an important European Court of Justice (ECJ) ruling of the same day in the so-called "Stauffer" case. Sections of German tax law were seen by the ECJ to be in conflict with the EC Treaty. According to current German tax law, tax exemption granted to public benefit organisations does not apply to public benefit organisations which have their registered office and/or governance structure outside Germany. Mr Houben reported that the case concerns a public benefit foundation based in Italy, Centro di Musicologia Walter Stauffer,

with income from German real estate assets, which was taxed by the German tax authorities. The Italian foundation questioned the tax authority's decision and took its case up to the German Federal Tax Court, which in turn called for a preliminary ruling from the ECJ. The Italian foundation pursued (in the tax year at issue) public benefit purposes in line with the German general tax code, and if it were a German-based organisation it would have been tax-exempt according to German corporate income tax law⁶. However, foundations with seat and management outside Germany are subject to limited tax liability on rental income in Germany without the possibility of tax exemption. Mr Houben stated that the ECJ considers the free movement of capital according to Article 56 of the EC Treaty to be applicable in the specific case. The fact that tax exemption for rental income applies only to public benefit foundations which, in principle, have unlimited tax liability in Germany places foundations whose seats are in another Member State at a disadvantage and may constitute an obstacle to the free movement of capital and payments. A potential justification of the different tax treatment was analysed by the Court in depth but not seen as being applicable. Mr Houben stressed that the decision of the European Court could open the door for the review of other national foundation tax laws and their compatibility with EC Treaty provisions.

Mr Houben informed participants that national tax laws are also under attack by the European Commission, which has started a series of infringement procedures in the field, one against Belgium and more recently against the UK. The Commission is of the opinion that the Walloon, UK tax schemes discriminate against foreign public benefit organisations. It is hoped that these infringement procedures will encourage Member States to introduce a cross-border friendly environment for foundations and their donors.

On July 10th 2006, the European Commission sent the United Kingdom a formal request to end discrimination against foreign-based charities⁷. The United Kingdom allows tax relief for gifts to charities, but only if they are established in the UK. Charities established in other Member States are excluded from the relief; the Commission considers that this discrimination is contrary to the EC Treaty. The request takes the form of a 'reasoned opinion' under Article 226 of the Treaty. If the United Kingdom does not reply satisfactorily to the reasoned opinion within two months the Commission may refer the matter to the ECJ. "The rules of the Internal Market forbid discrimination of charities in other Member States" and "gifts to bona fide charities in other Member States should get the same tax treatment as gifts made to domestic charities," said EU Taxation and Customs Commissioner László Kovács⁸. Mr Houben reported that in an oral statement the Commission said that in the UK case it is looking at various tax exemptions for charities and their donors and their potential conflict with the EC Treaty, such as income tax incentives for donors, tax treatment of charities (corporate income tax and capital gains tax) and inheritance tax. The UK tax scheme for charities is only one of the cases that is under review by European institutions. Last summer, the European Commission announced that it would take Belgium to the ECJ as it was of the opinion that Walloon inheritance and gift tax rules discriminate against foreign public benefit organisations. The rules provide for reduced taxation of donations (legacies and gifts) to Belgian public benefit organisations, which do not apply in the same way to donations to foreign public benefit organisations. The Commission has for the time being suspended the Walloon case and has not started the procedure before the European Court of Justice as it may wish to take a broader approach and look at other tax incentives for donors, e.g. in the field of income tax.

The essence of the above-mentioned infringement procedures of the European Commission, which would in principle also apply to other Member State jurisdictions, is the following: donations to foreign EU-based public benefit organisations should be treated like donations to resident public benefit organisations. Most national tax laws do not treat donations to resident and foreign public benefit organisations on an equal footing, and they would therefore be in conflict with the EC Treaty. The European Commission could be asked to go to other EU countries to review their legislation in this respect.

⁶ According to Article 5, section 1 no. 9 corporate income tax law (*Körperschaftsteuergesetz*)

⁷ The Commission's case reference number is 2005/2281.

⁸ See IP/06/964

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/964&format=HTML&aged=0&language=EN&guiLanguage=en>

8. Interim Solutions Developed by the Sector

In the absence of a European legal tool for foundations, the sector had to develop innovative structures to create international networks and funds.

a. The case of EUSTORY

Wolf Schmidt, Member of the Executive Board of the German Körber Foundation, presented the case study of EUSTORY, the History Network for Young Europeans, which currently connects 18 organisations from different European countries within the structure of an association. The mandate of EUSTORY is to view European history from the grass root level. According to its charter, EUSTORY emphasizes the view of history as a workshop for intercultural understanding in Europe. Since the EUSTORY network was founded in September 2001 on the initiative of the Hamburg-based Körber Foundation, some 70,000 youth have participated in EUSTORY history competitions. In addition to those involved in the individual national member organisations, there are about 2,000 teachers, experts, scholars and volunteers who give their time to EUSTORY and its projects. Over the past years, the EUSTORY network and the Körber Foundation have started to think about creating an international EUSTORY Foundation. The goal is to support European activities in the field of history in the context of the international EUSTORY network and related and complementary projects. The idea was publicly announced in January 2006. EUSTORY could present a model for a virtual European Foundation connecting civil society and the private sector in a framework of cooperation between a foundation and a bank. The Körber Foundation plans to establish this European foundation through formally independent national foundations, which are managed by a pan-European bank. It aims to bring together a minimum endowment of 2 million euros, which should grow in the following years. To this end, the Foundation is launching an international founders' consortium: Members of the founders' consortium should contribute with 100,000 euros each and should raise another 100,000 euros in their respective countries within 12 months after the establishment of the EUSTORY foundation. The foundation will be governed by a founders' board and an executive board. Mr Schmidt stressed that as soon as EU law provides for a European legal form of a foundation, the EUSTORY foundation would be transformed into such a European foundation. For more information on EUSTORY, please check http://www.koerber-stiftung.de/internationale_verstaendigung/eustory/on/network_structure.html

b. Transnational Giving Europe and Giving in Europe project

Ludwig Forrest of the King Baudouin Foundation outlined the Transnational Giving Europe Agreement, which enables donors – through private agreements – to identify qualifying partners in participating countries to facilitate cross-border giving. One good example is the Transnational Giving Europe Agreement between the Charities Aid Foundation (UK), the Fondation de France (France), Oranje Fonds (The Netherlands), the King Baudouin Foundation (Belgium) and Maecenata International (Germany). Recently, Poland and Ireland joined the initiative.

The King Baudouin Foundation has also launched a cross-border giving database, which collects information about the national legal and fiscal treatment of cross-border gifts, donations and legacies. It serves as an information tool for donors, intermediaries and beneficiaries about the best options and solutions for cross-border giving. The website currently covers 16 European countries (15 EU Member States and Switzerland) and is being extended to the 10 new Member States. As well as web-based information, the King Baudouin Foundation is establishing a network of European partners to support and disseminate this information. The database was officially launched in 2004. For more information, please consult the Giving in Europe website at: www.givingineurope.org.

9. Closing Remarks – Way Forward

Participants stressed their hope that the European Commission would announce in due course the launch of a feasibility study on a European Statute as an important step towards the introduction of such a European legal tool for foundations. Moreover, the ruling in the Stauffer Case as well as the above-mentioned four infringement procedures (and additional procedures to follow) create a momentum for improved cross-border philanthropy and it is hoped that Member States will introduce a friendlier cross-border environment for foundations and their donors. A recent law revision in the Netherlands can be seen as a benchmark in the field: This year, the Netherlands amended its legislation and now allows donations to qualifying foreign charitable organisations to be tax-deductible for the donor and equal treatment of local and foreign-based public benefit organisations. However, the criteria for defining a "qualifying foreign charitable organisation" have not yet been established.

The European Foundation Centre will continue to work towards a friendly operating environment for foundations' cross-border work, tax effective transnational giving, and for the development of a European foundation statute as a new legal instrument for European funders and foundations. Proposals for an effective European framework for foundations will be presented and discussed with politicians and foundation experts at a series of national and international events. Interested parties are invited to contact the EFC secretariat at eu@efc.be for further information.